IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EDWIN ALLEN, ET AL	**PLAINTIFFS**
VERSUS	**CIVIL ACTION NO. 4:97CV-57-D-B**
CITY OF GREENVILLE	**DEFENDANT**

MEMORANDUM OPINION

This cause is before this Court on the defendant City of Greenville, Mississippi's Motion for Summary Judgment. The Court, having considered the motion, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

FACTUAL BACKGROUND

This is a suit by thirty-eight (38) firefighters employed by the City of Greenville (hereafter "the City"). The firefighters claim that the City improperly excluded sleep time from hours worked for purposes of determining overtime compensation and failed to adequately compensate them for sleep interruptions. They seek actual and liquidated damages, attorney fees and an injunction prohibiting the City from continued violations of the Fair Labor Standards Act.

a. Implementation of New Policy

On or about October 1, 1985, the City implemented a new pay policy for its firefighters. The pay plan requires that the firefighters work five 24.5 hours shifts over the course of each two week pay period. Shifts begin at 5:30 p.m. and end at 6:00 p.m. the following day.[1] In all cases, firefighters are required to remain on duty until 5:30 p.m.; however, should their replacements arrive prior to 6:00 p.m., the firefighters are permitted to leave before the end of the shift. In the event a particular fireman's replacement does not arrive by 5:30 p.m., the firefighter is required to remain on duty until the shift ends at 6:00 p.m. Any hours worked past 6:00 p.m. are compensated as overtime.

When the new pay plan went into effect the City began to exclude (and continues to do so) sleep time from compensable hours worked. Accordingly, the firefighters are paid for 16.5 hours per shift. The

[1] Firefighters are permitted eight hours sleep time per shift in sleeping quarters provided by the City. The quarters are barracks style facilities, with a separate bed for each firefighter. The quarters are air-conditioned and heated; furthermore, the firefighters are provided with showers, toilets, lockers and kitchen facilities.

City advised firefighters of the new policy by means of memoranda posted on fire station bulletin boards. The new policy was also incorporated into a manual containing standard operating procedures. In addition to the formal notice described above, the firefighters' pay also reflects sleep time deductions.[2] While some of the firefighters grumbled about the new pay system, none sought formal redress from the City; nor did they assert a violation through the Wage and Hour Division of the Department of Labor. The firefighters continued to work and to accept their paychecks for a considerable time.

b. Aldridge Litigation

In1988 certain Greenville firefighters, some of whom are parties in the instant suit,[3] instigated a federal lawsuit against the City claiming that the sleep time exclusion violated the dictates of FLSA. Aldridge v. City of Greenville, Civil Action No. GC88-181-B-O. The Aldridge plaintiffs complained that the sleep time exclusion had been adopted without the agreement of the firefighters, that the policy was adopted solely for the discriminatory purpose of qualifying for the sleep time exemption; that plaintiffs were not paid overtime for hours worked in excess of 40 hours per week; and that the alleged violations were accomplished knowingly and willfully. Following a bench trial, District Judge Neal Biggers entered judgment in favor of the City, expressly finding in his memorandum opinion that the scheduled shifts exceeded twenty-four hours and that the sleep time exclusion was valid inasmuch as the "in-town" firefighters had impliedly agreed to the new policy by virtue of their failure to register effective objections.[4]

c. 1996 Picketing/Back Pay for Sleep Time Interruptions

Following the district court's decision in Aldridge, everything continued as before, with the City continuing to effect the sleep time exclusion. However, during the summer of 1996, certain firefighters–including those in the present litigation–began to picket City Hall. They likewise registered

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[2] The pay period is biweekly; the firemen work five shifts each pay period. Their paychecks reflect payment for 82.5 hours–that is, 5 shifts at 16.5 hours per shift.

[3] Specifically, Alvin Lucas, Homer Smith, William Aldridge, Green Taplin, Tyrone Cook, Larry Grayson, Steven Sutton, Joseph Venutti, Clester Williams, James McIntyre, Theo Scurlark, Jim Haney, Larry Lovett, and James Matthews. These plalintiffs fell among the category of "in-town" firefighters.

[4] The district court entered an earlier order on November 27,1990 which granted partial summary judgment against certain plaintiffs, finding that their failure to register any effective complaints concerning the new pay policy evidenced an implied agreement to the sleep time exclusion. See also Order dated May 28, 1991 clarifying the basis of the Court's earlier order.

complaints at City Council meetings. The protests stemmed from the firefighters' allegations that the City had improperly failed to compensate them for interruptions to sleep time occasioned by calls to duty. These continued protests culminated in the City's issuance of checks for back pay for interrupted sleep time, calculated based on dispatch records.[5]

Despite the City's efforts to placate the firefighters with pay for sleep time interruptions, plaintiffs filed the instant suit on or about April 18, 1997. After adequate time for discovery, the City filed its Motion for Summary Judgment, asserting entitlement to judgment as a matter of law based on plaintiff's inability to establish elements essential to recovery. In addition, the City sought summary judgment based on affirmative defenses of res judicata and/or collateral estoppel and the statute of limitations. The motion has been fully briefed and is ripe for decision.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure, Rule 56(c), authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corporation v. Catrett, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S. Ct. 2548 (1986). The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. John v. State of La. (Bd. Of T. for State C. & U., 757 F.2d 698, 712 (5th Cir. 1985).

A judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986).

Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that

[5] The radio log records the time a call is received, the unit assigned to respond, the time the unit was sent to respond, all actions taken in response, arrival time back at the fire station, with the final entry being the time a unit is "back in service." Compensation for sleep interruption was calculated in 30 minute intervals; furthermore, firefighters were compensated for the full eight hours sleep time in the event that interruptions exceeded three hours. Back pay was afforded for a three year interval.

role. Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986). "The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." Id. "With regard to 'materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. Phillips Oil Company, v. OKC Corporation, 812 F.2d 265, 272 95th Cir. 1987). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, . . . all other contested issues of fact are rendered immaterial. See Celotex, 477 U.S. at 323, 106 S. Ct. at 2552. Topalian v. Ehrman, 954 F.2d 1125, 1138 (5th Cir. 1992).

In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in a light most favorable to the non-moving party. McPherson v. Rankin, 736 F.2d 175, 178 (5th Cir. 1984).

The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. Union Planters Nat. Leasing v. Woods, 687 F.2d 117 (5th Cir. 1982). The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. Topalian, 954 F.2d at 1131.

"Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment]." John, 757 F.2d at 708. "Summary judgment cannot be supported solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment, " even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. Id. at 709.

However, once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. Ferguson v. National Broadcasting Co., Inc., 584 F.2d 111, 114 (5th Cir. 1978). In other words, "the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact." In Re Municipal Bond Reporting Antitrust Lit., 672 F.2d 436, 440 (5th Cir. 1982). To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the

pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed. R. Civ. P. See also Union Planters Nat. Leasing v. Woods, 687 F.2d at 119.

While generally "[t]he burden to discover a genuine issue of fact is not on [the] court, (Topalian, 954 F.2d at 1137), "Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention–the court must consider both before granting a summary judgment." John, 757 F.2d at 712, quoting Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980).

LEGAL ANALYSIS

Prior to 1985 municipalities were not subject to the requirements of the Fair Labor Standards Act. However, the Supreme Court did an about face in Garcia v. San Antonio Metropolitan Transit Authority, in which it overruled earlier precedent. 469 U.S. 528, 105 S. Ct. 1005 (1985). In response thereto, Congress amended the Act to permit municipalities a period of time in which to bring their pay plans into conformity with the requirements of the Act and to qualify for potential exemptions as well. See International Ass'n. of Firefighters v. City of Rome, 682 F. Supp. 522, 525-26 (N.D. Ga. 1988). Pursuant to the congressional amendment, municipalities did not become subject to the provisions of the Act until April 15, 1986. Id.

1. Sleep Time Exclusion

While section 7(a) of the Act generally mandates the payment of overtime compensation for all hours worked in excess of forty (40) per week, § 207(k) extends a more lenient standard to municipal employers of fire fighters, instead employing a standard which permits firefighters to work up to 106 hours in a two week pay period before entitlement to overtime compensation ensues. 29 C.F.R. § 553.230. In addition, regulations promulgated by the Secretary of Labor afford yet another potential "break" to municipalities. Pursuant to Title 29, section § 553.222,

> (c) Sleep time can be excluded from compensable hours of work, however, in the case of . . . firefighters who are on a tour of duty of more than 24 hours, but only if there is an express or implied agreement between the employer and the employees to exclude such time. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work).

29 C.F.R. § 553.222(c). However, even in the face of such an agreement, sleep time may be excluded only

if 1) adequate sleeping facilities are furnished by the employer; and 2) the employee is usually able to enjoy an uninterrupted night's sleep. 29 C.F.R. § 785.22. It should be noted that each of these conditions must be met before a municipal employer may take advantage of the sleep time exclusion permitted by the regulations. Consequently, if plaintiffs demonstrate a genuine issue of material fact as to any one of the conditions, summary judgment is inappropriate.

Plaintiffs attack the sleep time exclusion at every turn. First, they assert that their tour of duty does not exceed 24 hours, thereby rendering the City ineligible for the sleep time exemption. Second, they assert that they never entered an agreement–express or implied–to exclude sleep time from compensable hours worked. Third and fourth, they claim that the sleeping facilities furnished by the City are inadequate and that calls to duty regularly prevent them from enjoying a full night's sleep.

a. Tour of Duty in Excess of 24 hours

The record evidence reflects that the City posted memoranda notifying the employees of the new shifts at the time of adoption; furthermore, the 24.5 hour shifts are reflected in the "Red Book," or standard operating procedures manual. The manuals were maintained at each fire station and were available to all employees. Finally, and most conclusively, the City paid the firefighters based on a 24.5 hour shift. The firefighters' compensation was based on a biweekly pay plan; every paycheck subsequent to October 1, 1985 expressly showed payment for 82.5 hours, which when broken down equals 5 shifts of 24.5 hours with deductions for sleep time–or 16.5 compensable hours per shift.

Various plaintiffs hired subsequent to 1985 protest that they "understood" the shifts to be 24 hours on followed by 48 hours off. Still others assert that the shift policy was merely "on paper," while in actual practice the shifts were only 24 hours. All plaintiffs assert that they never stayed past 5:30 p.m.–except perhaps as a "favor" to a fellow firefighter who happened to be tardy for oncoming shift at 5:30 p.m.. Plaintiffs hinge their argument on the City's benevolence: e.g., they were free to leave when their relief arrived; therefore, if a firefighter's replacement arrived early, the firefighter being relieved was free to leave. But the argument is circuitous: none of the firefighters contests the fact that they could be forced to stay until 6:00 p.m. in the event their relief hadn't arrived. It is likewise conceded that hours worked beyond 6:00 p.m. were counted as overtime and the firefighters were compensated accordingly.

In short, there is no dispute as to the facts; rather, the only dispute is as to the legal effect of the

City's enlightened policy of permitting firefighters to leave prior to the conclusion of their shifts on the express condition that their replacement had already reported for duty. The Court concludes that the City adopted and employed a shift of 24.5 hours, thereby meeting the first of the elements necessary to claim the sleep time exclusion.[6]

b. Existence of Express or Implied Agreement

Notwithstanding the plaintiffs' resolute assertions that they never agreed–implicitly or otherwise–to exclude sleep time from compensation, the Court must conclude otherwise. Many of the firefighters involved in the present litigation were employed by the City well before the new pay plan was implemented. Only a few of their number were hired subsequent to October 1, 1985, the effective date of the new pay plan. All plaintiffs concede that the sleep time deductions were reflected in their biweekly paychecks; none contest that this documentation constituted ample notice of the City's pay plan, even though the policy may not have been fully explained at the outset. While some of the plaintiffs questioned the sleep time exclusion, and still others grumbled about the policy, none went so far as to register formal complaints–either internally or with the Wage and Hour Division of the Department of Labor. Instead, each of the plaintiff firefighters accepted their paychecks and continued to report for duty. And they did so, not for a period of weeks, or even a few months, but for years.

In the face of the foregoing, the Court is constrained to find the existence of an implied agreement by plaintiffs to exclude sleep time from hours worked. In doing so, the Court expressly takes note of numerous judicial decisions which hold that an employee's "continuance of employment can be evidence of an implied agreement to the terms of that employment," regardless of whether the employee is in favor of the policy. C.M. Rousseau v. Teledyne Movable Offshore, Inc., 805 F.2d 1245, 1248 (5th Cir. 1986), cert. denied, 484 U.S. 827 (1987). This evidence is bolstered by the plaintiffs' failure to take any formal steps to oppose the sleep time policy. See Braziel v. Tobosa, 166F.3d1061 (10th Cir. 1999)(upholding summary judgment based on implied agreement to exclude sleep time where plaintiffs continued to accept paychecks without registering formal complaints regarding the sleep time policy); Holb v. City of Beaufort, 996 F.2d 1211 (4th Cir. 1993) (affirming summary judgment based on implied agreement where plaintiffs accepted

[6] The Court notes that the plaintiffs delineated in note 3 supra are also foreclosed from any recovery of back time for sleep pay on grounds that the shift did not exceed 24 hours based on res judicata as discussed in the latter portions of this opinion.

paychecks and asserted only informal objections to policy). When the authorities thus cited are considered in conjunction with the *stare decisis* value of Judge Biggers' decision in the Aldridge case, discussed more fully *infra*, the Court is convinced that the defendant is entitled to judgment as a matter of law on this issue. Plaintiffs have failed to point to any significant probative evidence upon which a reasonable trier of fact might base a contrary conclusion. Accordingly, the Court finds that the City is entitled to summary judgment regarding the existence of an implied agreement to exclude sleep time from compensable time.[7]

c. Adequacy of the Sleeping Quarters

Plaintiffs also attack the adequacy of the sleeping facilities provided by the City. More than half of the plaintiffs complain that the mattresses are uncomfortable. Still others present a plethora of other complaints: insects and vermin; wet floors; noise; poor ventilation, heating and cooling; beds too small; inadequate shower space; smallness of the sleeping quarters. Despite defendant's assertion that these complaints are de minimis, the Court finds them sufficient to withstand entry of summary judgment.

d. Ability to Enjoy Uninterrupted Sleep

Likewise, while there is less evidence to suggest that the firefighters were not "usually" able to get an uninterrupted nights sleep as a result of calls to duty, the available evidence of record for various plaintiffs indicates that night time calls to duty were frequent. While the Court disagrees with the plaintiffs' aggregation of calls to duty in an effort to bolster the number of interruptions, the record evidence tends to show sleep interruptions occurred during 15% to 25% of shifts worked between 1994 and 1996. While this may ultimately prove insufficient to invalidate the sleep time exclusion claimed by the City, this Court finds it sufficient to withstand summary judgment.

2. Back Pay for Interrupted Sleep Time

Plaintiffs also assert that, even assuming the validity of the sleep time exclusion, the law requires that they be compensated for any sleep time interruptions occasioned by a call to duty. And, despite defendant's protestations to the contrary, the Court concludes that there is a genuine issue of material fact concerning whether plaintiffs were adequately compensated for all the work performed as a result of sleep time calls to duty. As strenuously pointed out by plaintiffs, 29 C.F.R. § 553.221(b) provides:

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[7] As in the foregoing note, the plaintiffs enumerated in note 3 are likewise foreclosed from recovery of sleep time pay based on lack of agreement on the additional grounds of res judicata as set forth in a later portion of this opinion.

> Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all . . . activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal acitivy, such as . . . writing up and completing . . . reports, and washing and re-racking fire hoses.

Id. Plaintiffs presented ample testimony "tending to establish that they were not paid for any duties performed after their unit was reported "back-in service" This was despite the fact that some employees performed reporting functions upon return to the station. Others testified that a unit was sometimes reported "back-in-service" before it had even returned to the station and/or before it was completely returned to a state of readiness for future calls.

The regulations place particular emphasis on work "suffered or permitted" by the employer. Title 29, section 785.11 of the regulations states:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may . . . desire to . . . prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

Id. Furthermore, the Court is unpersuaded by the defendant's assertion that the additional duties performed upon return from a sleep time call to duty could have waited until morning. The Secretary of Labor clearly places the onus of limiting work on the employer:

> In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13.

Finally, the Court does not find plaintiffs' inability to provide documentary evidence of the additional hours worked fatal to their claim. Pursuant to the FLSA, the duty is on the employer to maintain adequate records of wages, hours and conditions of employment. 29 U.S.C. § 211(c). Whittington v. Roberts, 360 F. Supp. 335 (N.D. Miss. 1973). The Court declines to summarily dismiss plaintiffs' claims without affording them a fair opportunity to present testimonial evidence in support of their claims for uncompensated sleep interruptions. See Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 (5th Cir. 1961); Leonard v. Carmichael Properties & Management Co., 614 F. Supp. 1182 (S.D. Fla. 1985). Accordingly, the defendants' motion for summary judgment as to the claims for compensation relative to

additional work performed during sleep time calls to duty is not well-taken and should be denied.

3. Liquidated Damages and Attorney Fees

Defendant's motion is not well-taken insofar as the issue of liquidated damages is concerned. There are genuine issues of material fact as to whether the City has met the requirements of good faith and a reasonable belief of compliance with the law. Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990). This is true especially with regard to plaintiffs' claim for liquidated damages stemming from the City's abject failure to pay for interrupted sleep time–as evidenced by the City's "voluntary" payment in response to protracted protests by the firefighters during 1996. The Court declines to enter summary judgment against the plaintiffs on their claims for liquidated damages and attorney fees.

4. Res Judicata

The City also asserts entitlement to summary judgment against fourteen of the plaintiffs in the instant suit on grounds of res judicata and/or collateral estoppel. Res judicata, otherwise known as "claim preclusion," and collateral estoppel, or "issue preclusion," are doctrines which effectively limit a party's right to seek redress for claims and/or issues which have been, or should have been, adjudicated on the merits in a prior action.

Res judicata, the broader of the two, bars a plaintiff from raising any claims, whether litigated or not, if they should have been addressed in an earlier case. In order for the doctrine to have effect, the following elements must be met:

a. Identity of parties;

b. Judgment in the prior action must have been rendered by a court of competent jurisdiction;

c. Entry of a final judgments on the merits; and

d. The second suit involves the same cause of action as the earlier adjudicated controversy.

Russell v. Sun America Securities, Inc., 962 F.2d 1169, 1172 (5th Cir. 1992). Each of the required elements is present in this case. The fourteen plaintiffs identified in note 3 were named plaintiffs in Aldridge v. City of Greenville, Civil Action No. GC88-181-BO, filed in the United States District Court for the Northern District of Mississippi. The Aldridge plaintiffs filed the action in 1998, in which they mounted a challenge to the pay plan adopted by the City of Greenville in 1985–the same pay plan challenged by plaintiffs today. The Aldridge plaintiffs asserted that the City's 24.5 hour shift plan violated

the provisions of the FLSA because it was adopted for the allegedly "improper" purpose of avoiding the overtime provisions of the Act. Plaintiffs in the litigation also attacked the City's right to the exclusion on the ground that the firefighters never agreed to the sleep time deduction.

District Judge Neal Biggers sustained a pretrial motion for summary judgment by the defendant City as to certain plaintiffs in November, 1990. The Court later conducted a nonjury trial as to the claims of the remaining party plaintiffs and on June 12, 1991, the Court entered final judgment against all of the "in-town" fire fighters, which included the fourteen plaintiffs at issue here. The Court entered written findings of fact and conclusions of law in which it found that the City in fact operated according to a 24.5 hour shift plan[8] and that it was within the City's prerogative to implement the plan in order to qualify for the sleep time exclusion. The Court likewise found that each of the "in-town" firefighters had manifested their implied acceptance of the new shift plan by continuing to work and accepting their pay (with sleep time deducted) for many months following the plan's implementation without taking any decisive action to demonstrate dissent.

While the Aldridge plaintiffs apparently never claimed that the 24.5 hour shift was less than bona fide, the participating plaintiffs are precluded from raising any claims which might have been raised in the same litigation. In the present case, the Complaint charges: "During the periods [1985 to the present] . . ., plaintiff firefighters, while employed with the Defendant . . . worked five shifts per bi-weekly period of twenty-four hours per shift. The defendant City of Greenville purported to schedule firefighters for twenty-four and one-half hours, which was a sham, and not the real practice." Certainly, this is a claim which plaintiffs should have raised during the Aldridge litigation. Plaintiffs' attempt to construe the earlier litigation as a mere challenge to the facial validity of the plan would require an impermissibly narrow construction of the claims raised by the earlier suit: however nicely characterized, the suit asserted a violation of the FLSA arising out of the City's adoption of the 24.5 hour plan. Those plaintiffs participating in the Aldridge suit are thus barred from asserting that the shift plan adopted in 1985 was a mere sham.

Even more evident is the fact that said plaintiffs are precluded from arguing their lack of assent to

[8] Again, while the Aldridge plaintiffs did not argue that they worked shifts of 24 hours or less, Judge Biggers' finding is still of import. Absent a tour of duty exceeding 24 hours, any agreement to exclude sleep time would have been invalid and unenforceable under the Act.

sleep time deductions. Paragraph VIII of the Aldridge Complaint pleads: "During [p]laintiff firefighters' employment, there was never any agreement, stated or implied, to exclude sleep time from being compensable."

However, not all of the Aldridge plaintiffs' claims are precluded based on res judicata. Certain of their claims survive because it is not evident that the claims involve the same cause of action or "could have been raised" during the 1988 litigation. Specifically, the Aldridge plaintiffs are not precluded from pursuing their claims of failure to provide adequate sleeping facilities and that frequent sleep time interruptions invalidate the exclusion. Nothing in the record indicates that the plaintiffs' complaints regarding said conditions predated the judgment in the Aldridge suit. And, in fact, given the lapse of time, it is just as reasonable (if not more so) to conclude that the condition of the sleeping quarters deteriorated in the five years following the judgment in Aldridge. Similarly, night time calls to duty may have increased markedly over the same period. Because the Court is not satisfied that the plaintiffs could have raised such claims in the earlier litigation, plaintiffs are not precluded from raising the inadequacy of sleeping quarters and frequent sleep time interruptions as a basis for disqualification of the sleep time exemption.

5. Retaliation

Plaintiffs also assert their right to recover for alleged retaliatory acts engaged in by defendant as a result of their exercise of right under the FLSA. A claim of retaliation in a FLSA case is analyzed under the same shifting burden test established in McDonnell-Douglass Corp. v. Green. 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff first bears the burden of establishing a prima facie case of retaliation. The elements of a prima facie case are:

1. Employee's participation in a protected activity;
2. A showing that the employee suffered an adverse employment action affecting the terms and conditions of employment; and
3. Causation.

Rath v. Selection Research, Inc., 978 F.2d 1087, 1089 (8th Cir. 1992). Causation may be proven by demonstrating a close temporal relationship between the protected activity and the adverse employment action. Id. Once the employee demonstrates a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory basis for the adverse employment decision. If the

employer does so, the burden shifts back to the employee who then must assume the ultimate burden of establishing that the employer's decision was a motivating factor in the employment decision. Id.

Defendant recites a list of plaintiffs who conceded by way of deposition testimony that they do not claim retaliation.[9] Plaintiffs' response brief never addresses this assertion.[10] The retaliation claims of these individuals are therefore subject to summary dismissal based on plaintiffs' failure to produce probative evidence tending to support the claims.

As to the other plaintiffs who do assert retaliation claims, the City charges that they are incapable of establishing a prima facie case because they cannot demonstrate a connection between the alleged retaliatory actions and by participation in FLSA activity. Plaintiffs' counsel touts a litany of actions engaged in by plaintiffs which might presumably satisfy the requirement that the claimants assert rights under the FLSA. However, neither the plaintiffs' memorandum brief nor the record excerpts afford any basis for this Court to determine whether a particular plaintiff's claim should survive summary judgment. The responsive brief deals only with generalities, e.g., "two" protesters were terminated; "several" were suspended without pay or were forced to submit to random drug testing; "some" were given unfavorable evaluations or frivolous writeups. Similarly, although Plaintiffs contend that they may prove the necessary causative relationship by showing that the adverse employment action followed closely on the heels of protected activity, plaintiffs have pointed to no evidence which establishes a chronology of FLSA activity and alleged retaliation for each plaintiff. The Court is not required to scour the record in an effort to find a genuine issue of material fact. Based on plaintiffs' failure to come forward with evidence demonstrating a triable issue of fact as to the retaliation claims, the Court finds that the defendant's motion is well-taken as

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[9] The individuals listed are Tyrone Cook, Green Taplin, Larry Grayson, Steven Sutton, William Aldridge, Edwin Allen, Lee Hinton, Alfred Wade, Jimmy Haney, James Buggs, James McIntire, Theo Scurlark, Victor Austin, Donald Clay, James Mattic, Darren Luke, Sedrick Jackson, Willie Jackson, Lonnie Newsome, Carol Nichols and Victor Anderson.

[10] Instead, plaintiffs' counsel merely avers in her brief that "[t]he defendant states the plaintiffs alleging retaliation have shown no evidence." In view of the failure of plaintiffs' counsel to specifically refute the City's contention that the afore-mentioned plaintiffs denied having a retaliation claim, the Court infers that the statement is refers to those remaining plaintiffs whose retaliation claims were addressed by defendant on the merits. This conclusion is buttressed by additional statements in the opposition brief which point to specific conduct allegedly protected by the FLSA, i.e., " All of the plaintiffs alleging retaliation were . . . actively involved in the organized protests and picketing . . . ."

to the issue of retaliation.

6. Statute of Limitations

Defendant also asserts a statute of limitations defense as an absolute bar to recovery by the vast majority of plaintiffs in this case. 29 U.S.C. § 255(a). In essence, defendants assert that most plaintiffs learned of the City's policy of deducting sleep time from the firefighters' pay when the policy was first adopted in October 1985. As for the plaintiffs hired subsequent to the policy's implementation, defendant argues that they became aware of the sleep time policy no later than when they received their second pay check. While defendant's observations are no doubt correct, they do not afford an ample basis for summary disposition when considered in light of the issues remaining for trial. Plaintiffs' challenges to the City's sleep time policy are grounded in charges that the City failed to provide adequate sleeping facilities and that the firefighters were not usually able to enjoy a full night's sleep. Each of these factors is an intangible, subject to change over time. As a result, the Court is presently incapable of determining when the City's sleep time policy violated the FLSA, if at all.[11] Therefore, defendant's motion based on the statute of limitations is not well-taken as to the allegedly invalid sleep time exclusion.

However, the issue of plaintiff's claim for back pay and liquidated damages for the City's alleged failure to pay for interrupted sleep time is a different matter. Plaintiffs allege that the City failed to pay for interrupted sleep time at all for a number of years following the Aldridge litigation. They continue to assert that the City does not pay them for all work performed as a result of sleep time calls to duty. The Court has fully considered the matter and finds that each failure to adequately compensate plaintiffs for interrupted sleep time constitutes a separate violation. Therefore, while plaintiffs are precluded from recovering any back wages or liquidated damages for initial and/or recurring violations which occurred outside the limitations period, they may pursue a recovery for any alleged violations occurring within three years prior to the filing of their Complaint.[12] Hendrix v. Yazoo City, 911 F.2d 1102 (5th Cir. 1990).

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[11] Nor is the Court persuaded that it is possessed of sufficient information to determine whether the general two year statute or the broader three year statute for willful violations should apply to the plaintiffs' claim for sleep time pay.

[12] While the Court is willing to consider evidence and argument to the contrary during the scheduled trial of this cause, the Court is presently of the mind that the defendant's alleged outright failure to pay its firefighters for sleep time interruptions prior to 1996 constituted a willful violation of the FLSA as amplified by the interpretative regulations promulgated by the

CONCLUSION

Based on the foregoing facts and analysis, the Court finds as a matter of law that the firefighters' tour of duty exceeded 24 hours and that the plaintiff firefighters' impliedly agreed to the deduction of sleep time as shown by their acceptance of pay and continued work without voicing effective dissent or otherwise seeking redress of their complaints. The plaintiffs who participated in the Aldridge litigation are precluded from asserting these claims on the additional ground of res judicata. The defendant's motion for summary judgment is well-taken as to these issues. However, the Court finds that summary judgment is not warranted as to the following issues: the adequacy of sleeping quarters furnished by defendant; the firefighters' ability to enjoy an uninterrupted night's sleep; the adequacy of back pay for interrupted sleep time; the plaintiffs' claim for liquidated damages and attorneys fees pursuant to 29 U.S.C. § 216(b). In addition, the defendant is entitled to judgment as a matter of law on the retaliation claim. Finally, any recovery by plaintiffs' for inadequately compensated sleep time interruptions and liquidated damages for same will be limited to the three year period preceding the filing of this action. A separate order will be entered herein in accordance with the foregoing opinion.

This, the _____ day of December, 1999.

_____
W. ALLEN PEPPER, JR.
UNITED STATES DISTRICT JUDGE

Secretary of Labor.